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COMMENTARY

NO-FAULT: AN INVITATION TO MORE ACCIDENTS

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I. INTRODUCTION

As we are all aware, proposals have been made to compensate persons injured in highway accidents regardless of fault. While it is claimed that the drastic changes in regard to the fixation of responsibility will not increase the number of accidents, this view is not supported by responsible research. Arguing that it is unrealistic to determine fault in vehicular mishaps, some social and legal theoreticians, in arriving at their conclusions, have made unverified assumptions regarding traffic safety. For example, Daniel Patrick Moynihan has theorized that accidents simply happen at random. Because chance supposedly plays a dominant role in auto mishaps, it is to be inferred that it would make no difference were the current fault system abolished.¹ He also suggested that a large proportion of accidents are caused by vehicular malfunction and, therefore, are not due to the culpability of drivers.² Taking a different approach, but arriving at the same conclusion, Professors Robert E. Keeton and Jeffrey O'Connell have argued that no change in law can significantly affect driver behavior because the overriding factor in auto management is the driver's fear of injuring himself.³ Further, they contend that because criminal law would still exist, this deterrence would be sufficient.⁴

In 1969, the Defense Research Institute asked me to determine the deterrent effects of the current fault system. Having examined the assertions made by the proponents of no-fault, in conducting my study I used the analytical techniques developed in a twenty-five year span of traffic-accident research and modification of

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1. D. MOYNIHAN, REPORT OF SECRETARY'S ADVISORY COMMITTEE ON TRAFFIC SAFETY at 101 (1968).

2. *Id.* at 82.

3. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 253 (1965).

4. *Id.* at 368.

driver and pedestrian environment. It was my conclusion that adoption of a no-fault system would materially increase accidents, injuries, and fatalities.⁵

Two subsequent studies were also made in regard to accident occurrence and deterrence. In 1970, a Department of Transportation study, prepared by Professor David Klein and Dr. Julian A. Waller, recommended that resources be diverted to modification of environmental conditions and away from determination of individual culpability in roadway accidents.⁶ In 1971, my original findings were supported in an independent work prepared for the Defense Research Institute by Dr. James C. Mancuso, who warned against radical changes of well-practiced policies and recommended an increased usage of procedures, such as the tort system, wherein individuals face each other to determine culpability.⁷

Destruction of our present system, which is primarily concerned with accident causation, should not be countenanced until there has been a reasonable showing that such a change will not increase the current toll of highway injuries and deaths. It is my sincere hope that the following summary of my own research and my comments on the Klein and Waller study will result in a better understanding of the issues involved.

II. THE LAWTON STUDY

In commencing my investigation, I first examined the basic assumptions underlying the no-fault concept to determine whether they were in accord with accepted safety research.

First receiving my attention was the assumption that random chance is the primary cause of accidents. If this were true, accidents would vary in direct proportion to the traffic volume. Investigation has shown, however, that the risk of an accident is much greater at night, particularly after midnight—a time at which traffic congestion is minimal. Since the condition of cars and highways remains constant after midnight, the increased accident rate is obviously due to a greater prevalence of faulty driving. Further, if bad luck were the principal causative factor, accidents would occur

5. L. LAWTON, *FAULT: A DETERRENT TO HIGHWAY ACCIDENTS* (1969); L. LAWTON, *PSYCHOLOGICAL ASPECTS OF THE FAULT SYSTEM AS COMPARED WITH THE NO-FAULT SYSTEM OF AUTOMOBILE INSURANCE* (1969).

6. D. KLEIN & J. WALLER, *CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES* (1970) [hereinafter cited as D.O.T. MONOGRAPH].

7. J. MANCUSO, *THE CONCEPT OF CULPABILITY: ITS UTILITY IN PROMOTING PROPER ROADWAY USE* (1971).

uniformly throughout the driving population. However, surveys of broad population groups show that there is a much higher degree of accident involvement in certain groups. Young male drivers, in particular, have a vehicular death rate that greatly exceeds any other group. In addition, many studies demonstrate that accident-involved drivers tend to be psychologically maladjusted, using their cars as mechanisms for venting tensions. The importance of driver psychopathology in accident causation has also been indicated by the higher accident rate among poor credit risks and people hospitalized for suicidal gestures. Alcoholics and other problem drinkers are involved in 25,000 traffic fatalities each year. Considering the combined accident experience of the psychological misfit and the excessive drinker, it is apparent that a small proportion of our population is responsible for more than half of all serious accidents. These findings refute the contention that accidents are primarily the result of random chance.

Another assumption of no-fault proponents is that many accidents are the result of vehicular defects and, thus, cannot be attributed to the culpability of drivers. While it is true that vehicular malfunction accounts for a small, but significant, portion of accidents, this, too, is a form of negligence for which there is no excuse. Not only must we attempt to eliminate the manufacture and operation of defective automobiles, we must also correct deficiencies in highway design. Most hazards caused by these deficiencies could be eliminated by following published safety policies and procedures.

Proponents of no-fault who assume fear of self-injury to be the major deterrent to mishaps ignore the fact that many people do, in fact, knowingly engage in inherently dangerous activities despite the risk of harm involved. Holding the belief that tragedy will never strike home, people readily banish their fears. This type of rationalization has enabled millions of people to freely smoke cigarettes despite the obvious danger of lung cancer. As applied to the automobile, widespread non-use of seat belts demonstrates the fact that most drivers simply do not believe they will ever be involved in a serious accident. In light of this, it should not be so readily assumed that fear of self-injury is a sufficient deterrent to vehicle mismanagement.

Those who would abolish our present system of tort recovery also assume that the imposition of criminal sanctions supplies an

adequate deterrent. This, again, ignores the fact that few of us believe we will be involved in a major accident. In addition, most of us realize that serious criminal penalties result from only a small proportion of all major accidents. Police can enforce traffic laws only when evidence of violations will meet the standards required by criminal law. While charges of speeding can be supported by mechanical means, such as radar, the majority of driver actions causing accidents cannot be documented through means which will meet the strict standards of criminal law. Consequently, invocation of criminal law and quasi-criminal punishments, such as fines, have not deterred highway accidents. In light of these factors, the deterrent value of a possible, future criminal prosecution can be said to be, at best, remote.

Traffic engineers have long been acquainted with the truism that every citizen is his own traffic expert. Because the problem of roadway mishaps is far too important to be decided on the basis of unsupported assumption, claims of such "experts" to the effect that no change in law could increase accidents cannot be controlling. What must be applied to evaluate the changes in safety which could be expected from a change in automobile insurance law are the disciplined techniques of systems analysis. The formulation of a systems model makes it possible to determine the relationship between accident frequency and system deterrence. Before any change is made, particularly where public safety may be involved, it is essential that policymakers have in their possession the best possible knowledge of the attributes of the system to be changed.

Based in part upon experiments which have demonstrated the effect of group pressure upon individual behavior and results obtained through employment of the systems analysis method, I have concluded that the present system of tort recovery based on personal liability should be retained. It has often been demonstrated that individual behavior is influenced by the actual or implied expectation of others and that actions of individuals often reflect group beliefs. Many studies have indicated that as the number of contacts between the individual and the group increase, influence exerted on the individual simultaneously increases. It has been further demonstrated that the intensity of this influence further increases to the extent that the individual is singled out by the group. This research shows how individuals can be induced to change their beliefs and behavior when they are exposed to group opinion.

Perhaps a closer look at the nature of experiments conducted

will better demonstrate the effectiveness of group pressure. In one study conducted at the Lackland Air Force Base, every driver involved in a personal injury accident was called in for a review of his service record and an interview with the camp psychiatrist. This method of intensifying the disapproval of faulty driving behavior reduced the number of personal injury accidents by more than fifty percent. In another study, conducted by Kaestner in Oregon, problem drivers were randomly assigned to four groups. No further contact was made with the first group. A standard form letter was sent to the second. The other groups were sent letters personalized to varied degrees. Subsequent accident reduction was found to be in direct proportion to the extent to which the individual driver was singled out. Those receiving the highly individualized soft-sell letters were involved in but one-fifth as many avoidable accidents as those in the first group. In yet another study, this time using subjects involved in only mild traffic infractions, drivers were assigned to either a personalized interview or a control group. A total of 66 accidents were subsequently recorded in the control group, as compared to only fifty accidents among the drivers interviewed. Similarly, in a study involving three groups—one receiving a simple warning, the second attending a standard safety school, and the third participating in sessions run by the author, who allowed wide-ranging discussion by the participants and interjected only when he heard a rationalization—it was found that of twenty-three subsequently reported accidents, only one involved a member of the third group.

These demonstrations conducted by independent investigators all lead to the same conclusion—when negligent drivers are singled out, the more determined the effort to bring about a realization in the individual of his wrongful behavior, the greater the reduction in auto accidents. Because the fault concept is an established norm and most people believe that driver fault is the primary cause of automobile mishaps, it would appear, on the basis of experiments conducted, that the intensification of this belief would reduce accidents. Because tort procedure serves as a community expression of disapproval of those actions causing accidents, it should not be too hastily swept aside.

In conducting my study, I also examined the workings of the existing fault system to determine the mechanisms by which antipathy toward negligent driving may have permeated the mores of the community. Analyzed were both the various interactions brought

into play as a result of a minor accident and the operating mechanisms of the proposed no-fault plan. Utilizing the parameters derived from the results of the many different investigations conducted, I first constructed a mathematical model and then employed it to make a detailed step-by-step comparison of the existing and proposed systems. From this model it was found that the fault system does, in fact, maximize deterrence, and that the deterrent value of the no-fault system is virtually non-existent.

A further analysis was made of aggressive driving behavior, reference being made to definitive studies of aggression. These studies merely proved what our common sense tells us—that aggression will seek out the lowest level of retaliation and continue to stalk those victims against whom a display of aggression will meet with a minimum of reproof. Inasmuch as the proposed no-fault system would nullify the existing community disapproval of actions causing accidents, aggressive drivers would run unchecked through a series of minor accidents. To experienced accident-analysis engineers, it is well known that only a small margin separates the minor incident from the fatal accident. If a change in the behavior pattern of the driver does not follow his involvement in the minor mishap, a major accident will inevitably result. Should abhorrence of reckless actions not be expressed by the community, the aggressive driver could very readily become involved in an accident resulting in death or permanent injury.

In light of the fact that the present fault system maximizes social censure of negligent driving habits, a factor of primary importance in the control of individual behavior, it was, and is, my opinion that the no-fault insurance system should not be adopted, as it could only increase the frequency of major automobile accidents.

III. THE KLEIN AND WALLER STUDY

As one of a series of volumes in the Automobile Insurance Study, the work of Klein and Waller was undertaken for the purpose of determining the relative value of no-fault. Although there is much of value in this study, it concentrates heavily on elaborating a negative view of accident deterrence. Virtually no guidance is offered which would be helpful in determining whether the proposed change in legal systems would increase injuries and deaths. While I am somewhat flattered that these writers expend much effort on a critical analysis of my own research, as Dr. Mancuso

has commented, it is unfortunate that so much of their monograph attempts to discredit Lawton rather than clarify the theory and principles upon which their own conclusions are based.⁸

In analyzing the work of Klein and Waller, we see that their evaluation of the fault system is limited to one brief paragraph,⁹ consisting of two simple parts. The first assertion (statement "A") notes that drivers who are members of deviant sub-groups will conform to deviant, rather than to conventional, driving norms. The second assertion (statement "B") then concludes that since the assumed deterrence will least affect the groups most in need of it, the fault system lacks deterrent value. At first reading, this deduction may appear to be totally reasonable. "B" follows "A." But is it really logical?

Klein and Waller tell us that if the precipitation of crashes is regarded as anti-social behavior, then findings in criminology may be relevant.¹⁰ Let us turn to a short discussion of criminal behavior to see if "B" truly follows "A." Following their logic, it could be said that crime is the result of deviant criminal acts. Since criminal law does not affect members of deviant sub-groups (criminals), it obviously lacks deterrent value. Therefore, using their type of logic, it could be concluded that all laws concerning criminal behavior should be abandoned. This, of course, is sheer nonsense. If we abolish the criminal law, who would doubt that crime would increase?

Taking issue with a conclusion I reached in my study, Klein would also have us believe that drug abuse, by itself, is not an accident-causation factor. Thus, he asks, "Can Lawton cite evidence that drug abuse is related to crashes when it is not accompanied by a level of blood alcohol sufficient in itself to account for the crash?"¹¹ In asking such a question, Klein displays a lack of knowledge as to accident-causation factors. It is well known that some drugs, as well as alcohol, interfere with higher brain functions controlling the exercise of judgment and caution. This lowering of normal restraint can result in the affected individual's becoming an incautious driver, thereby increasing his probability of causing an accident.¹² Klein, in short, is mistaken as to the facts uncovered by

8. J. MANCUSO, *FAULT—A BASIC REQUISITE OF SOUND PUBLIC POLICY* 404 (1971).

9. D.O.T. MONOGRAPH at 134.

10. *Id.* at 204.

11. D. KLEIN, A CRITIQUE OF LAWTON'S "PSYCHOLOGICAL ASPECTS OF THE FAULT SYSTEM" 40 (1970).

12. L. LAWTON, *PSYCHOLOGICAL ASPECTS OF THE FAULT SYSTEM AS COMPARED WITH THE NO-FAULT SYSTEM OF AUTOMOBILE INSURANCE* 21 (1969).

research. In a study of actual crash experience, amphetamine abusers showed high crash rates, whereas persons dependent on barbiturates and tranquilizers did not.¹³ In addition, New York State has conducted research which shows that drug addicts are dangerous drivers. The records of 1,226 male heroin addicts disclosed a total of 402 accidents involving injury or death. Yet, not one of these addicts was ever convicted of driving under the influence of drugs.¹⁴ The experience in New York State is in accord with my previous observation that there are no simple tests available to law enforcement agencies which can certify prior consumption of marijuana, barbiturates, amphetamines, or LSD.¹⁵ In marked contrast, use of the Breath-a-Lyzer enabled 3,000 arrests per month for drunken driving in North Carolina.¹⁶ This inability to detect drug usage would have dangerous implications were a no-fault system adopted. Accidents would be ascribed to the idle whim of pure chance, and the existing restraint now exercised by the multitude of users of milder depressant drugs, such as barbiturates and tranquilizers, would be lifted.

Using to a large degree a methodology similar to that previously employed by myself, Klein and Waller, in their inadvertent depreciation of the underlying safety assumptions of the no-fault concept, make an important contribution to the cause of those who would retain the present system. First they offer additional testimony as to the inadequacy of criminal deterrence. Readily admitting that criminal law is not a sufficient deterrent, these writers point out that the public is aware of the fact that the traffic regulations which are enforced do not cover the types of driver actions that cause crashes.¹⁷ Furthermore, these writers recognize that if deterrent measures concentrated on a punitive approach, the only route open would be to increase the severity of punishment—an action which would cause intolerable economic and social dislocations.¹⁸ Because the law-abiding citizen feels that he may commit a similar traffic offense, the public will not support an increase in the

13. D.O.T. MONOGRAPH at 80.

14. N.Y. STATE DEPT. OF MOTOR VEHICLES, DRIVING RECORDS OF HEROIN ADDICTS (1969).

15. L. LAWTON, *supra* note 12, at 44.

16. Altman, *North Carolina Reduces Auto Deaths for Second Year*, N.Y. Times, Nov. 29, 1970, at 86.

17. D.O.T. MONOGRAPH at 139.

18. *Id.* at 215.

severity of traffic court penalties.¹⁹ In addition, the futility of criminal sanctions against the so-called "problem" driver is recognized. Do not these findings rebut the contentions of Keeton and O'Connell—the most forceful supporters of the no-fault system?

Further, attacking the foundation of Moynihan's theory, Klein, negating the validity of the belief that accidents merely happen at random, has written:

Current research demonstrates clearly that accidents are not random events—both the causes and the individuals most likely to be involved can to some extent be identified.²⁰

Weakening the arguments of those no-fault proponents who contend that vehicle malfunction is the cause of a large proportion of accidents, Klein has noted that neither safety experts nor the public concur in this belief. While commenting that mechanical defects are quite likely to contribute to the precipitation of crashes, he does qualify this remark by admitting that this is not to say that crashes are caused by vehicular malfunction.²¹

As to the assumption of no-fault advocates that self-injury is the primary deterrent to those actions causing mishaps, Klein only indirectly undermines its foundation. While not disputing the evidence I cited for the proposition that people ignore the danger inherent in a potentially dangerous practice in accordance with the accepted psychological doctrine of cognitive dissonance,²² Klein's rejoinder is a statement to the effect that despite this doctrine, cigarette smoking is diminishing.²³ But let us look at the record. In 1964, the Surgeon General's report concluded that cigarette smoking causes lung cancer. Since that time there has been a massive campaign to warn consumers of the dangers of smoking. Nevertheless, consumption of cigarettes only decreased from 214 packs in 1963 to 198 in 1970—a drop of less than seven percent.²⁴ Again we see additional proof that fear of self-injury simply is not a major deterrent to those actions likely to result in physical harm.

In addition to their perhaps inadvertent attack upon the very assumptions relied upon as justification for the position taken by those supporting no-fault, Klein and Waller also appear to bolster

19. *Id.* at 133.

20. D. KLEIN, *supra* note 11, at 18.

21. *Id.* at 19.

22. L. LAWTON, *supra* note 12, at 15-20.

23. D. KLEIN, *supra* note 11, at 36.

24. N.Y. Times, June 13, 1971, § E, at 2.

the arguments I make in opposition to change of our present tort recovery system. For example, does not their basic premise that drivers who are members of deviant sub-groups will conform to deviant norms imply that behavior is influenced by social attitude and, thus, support my conclusion that individual driving behavior is affected by social attitude? It is interesting to note that Klein, in 1970, co-authored a paper²⁵ which, in exploring the correlation between errant behavior of fathers and sons, recognized the relationship between behavior and socialization processes.²⁶ Also instructive is Klein's recognition of the court system as an agency of socialization in discouraging deviant behavior.²⁷ This awareness of the weight of socialization influences upon driver behavior is evidenced in the Klein and Waller study by their citation of past evidence linking social attitude and accident involvement,²⁸ their discussion of the Kaestner and Syring interview program,²⁹ and their review of the Oregon experiment conducted by Kaestner.³⁰

Not only do Klein and Waller, thus, recognize the role of social influence upon driver behavior, they also are aware of the effect of a change in the law upon the attitudes of the individual. In their words, research clearly demonstrates that "when the environment

25. Carlson & Klein, *Familial vs. Institutional Socialization of the Young Traffic Offender*, 2 J. OF SAFETY RESEARCH 13 (1970).

26. In demonstrating this relationship, Klein wrote:

The driving records, academic performance, and police contacts of 8094 male undergraduates at a large state university were analyzed, and each student's history of traffic convictions and crashes was compared with that of his father. The positive correlation found between fathers' and sons' conviction incidence supports the hypothesis that driving behavior is learned more through familiar than through institutional socialization and that delinquent familial socialization results in delinquent traffic behavior.

Id. at 13.

27. As Klein stated:

The schools, the police, and the court system are social institutions which teach and enforce the value system generally approved by the society as a whole. . . . (T)hese institutions encourage behavior believed to produce general social harmony and discourage disfunctional deviant behavior.

Id. at 15.

28. D.O.T. MONOGRAPH at 17.

29. In discussing this program, Klein and Waller point out that interviews consisting of mere sloganeering and moralizing were ineffective, whereas those restructured to individual needs and attitudes did reduce accidents. *Id.* at 164.

30. Agreeing with my observations that the impersonalized form letter used in this experiment produced no result whereas personalized letters significantly reduced accidents, Klein and Waller attributed the greater reduction of crash occurrence in young drivers to the fact "that young drivers would be more susceptible to social influences than middle-aged and older drivers." *Id.* at 165.

is changed, by legislation or by administrative fiat, attitudes change to correspond to the new environment."³¹ We need not wonder whether attitudes toward safe driving behavior would change under a no-fault concept. Klein and Waller give us a clear insight as to what can be expected if individual responsibility is abolished by law.

In light of their inadvertent attack upon the basic assumptions of no-fault proponents and their recognition of the major role played by socialization processes in the control of individual behavior, one might ask what has caused Klein and Waller to go astray in their recommendations concerning the adoption of no-fault. Perhaps it is attributable to their lack of professional experience in dealing with actual traffic accidents. For example, they begin their essay with a statement to the effect that there is no profession dealing with the entire field of traffic safety.³² Thus, from the start, they are wrong. They should be informed that professional concern with traffic-accident causation began nearly forty years ago with the founding of the Institute of Traffic Engineers. They are equally misguided in their recommendation that resources now devoted to the determination of individual culpability be shifted to a modification of environmental conditions,³³ for this assertion is based on the erroneous premise that the present legal system is holding back needed traffic-safety improvements.

What may also have caused these writers to go astray is their proclivity for concentrating on side issues, while by-passing the obvious. For example, in analyzing the Lackland Air Force Base study, Klein and Waller note that there was a significant reduction in crashes through imposition of the threat of psychiatric referral. While conceding the methodological excellence of this study, Klein and Waller proceed to criticize it because the airmen were a captive group and the use of psychiatric referral as a punitive threat might have stigmatized psychiatric services.³⁴ What they fail to point out, however, is that the prospect of increased social censure reduced subsequent accidents by more than fifty percent—the very lesson to be learned by all the various demonstrations in which accidents were reduced by emphasizing individual accountability.

Because Klein and Waller avoided the basic issue as to whether

31. *Id.* at 203.

32. *Id.* at 5.

33. *Id.* at 217-18.

34. *Id.* at 128-29.

or not the proposed change in legal systems would increase injuries or deaths, their work should not be cited as justification for adoption of no-fault. As we have seen, the major thrust of their work consisted of the propagation of a negative view toward accident deterrence. Having inadvertently attacked the assumptions of no-fault proponents and bolstered the arguments made by myself, these writers, nevertheless, claim to have made out a case in support of abandonment of our present system. Being based, as it is, upon an improper evaluation of the fault system and the mistaken premise that our present legal system is holding back needed traffic-safety improvements, the Klein and Waller study should not be accepted as scientific proof that adoption of no-fault would cure our problems regarding highway safety.

IV. CONCLUSION

In light of my former findings, those independently reached by Dr. Mancuso, and even the inadvertent teachings of the Klein and Waller report, I do not believe the concept of culpability in driving behavior should be abandoned. The adoption of a no-fault system would do far more than remove the existent deterrents to negligent driving—it would set up an environment in which unsafe driving habits would no longer meet with social censure. Indeed, under such a system unsafe actions could even meet with sympathetic understanding. Knowing the influence of social censure upon undesirable behavior, can we afford to abolish a system wherein that censure is most pronouncedly expressed? Can we afford to gamble with our lives? Recognizing the folly of hastily effecting drastic change, Thomas Burke long ago commented:

An ignorant man, who is not fool enough to meddle with his clock, is, however, sufficiently confident to think he can safely take to pieces and put together, at his pleasure, a moral machine of another guise, importance and complexity, composed of far other wheels and springs and balances and counteracting and cooperating powers. Men little think how immorally they act in rashly meddling with what they do not understand.